DATE: January 5, 1995

TO : Peter W. Hirsch, Regional Director
Region 4

FROM : Robert E. Allen, Associate General Counsel
Division of Advice

177-1650

SUBJECT: Bartlett Services, Inc. 524-0133-6200
and Philadelphia Electric Company 530-4825-5000
Cases 4-CA-22410 and 22843 601-5050-7600

This case was submitted for advice as to whether (1) Philadelphia Electric Company (PECO), owner of a nuclear power station, and Bartlett Services, Inc. (Bartlett Services), one of its contractors at the site, are joint employers with joint and several liability for Bartlett's unfair labor practices, and/or (2) PECO independently violated the Act by refusing to enter into a subcontract with Bartlett Services unless Bartlett Services withdrew recognition from its employees' Section 9 (a) representative and entered a pre-hire agreement with another union.

FACTS

PECO operates nuclear plants at two sites - Limerick and Peachbottom, Pennsylvania. Bartlett Services has had a contract with PECO to provide radwaste services (cleaning services of radioactive waste) at the Peachbottom facility for years. Bartlett Services' Peachbottom employees are represented by the IBEW.

Until recently, PECO had contracts with other contractors to perform radwaste services at Limerick. In 1986, PECO had a contract with Bechtel Western Power Corporation for the Limerick radwaste service. During the term of that contract, the Oil, Chemical & Atomic Workers International Union Local 8-901 (OCAW or the Union) was certified by the Board as the collective-bargaining representative of all radwaste technicians employed by Bechtel at Limerick. In about 1990, PECO awarded the Limerick radwaste contract to Allied Radiological Control (ARC). ARC hired a majority of Bechtel's former employees, assumed the Bechtel-OCAW agreement and, upon its expiration, entered into a successor agreement with the Union.

In late 1993, PECO decided not to renew the contract with ARC, and solicited bids for a radwaste contract for both Limerick and Peachbottom, changing its longstanding practice of bidding contracts for each plant separately. On December 22, 1993, John C. Thomas of PECO wrote to Bruce Bartlett, President of Bartlett Services, as follows:

> PECO, within the last two years, has begun to use Nuclear Group system-wide purchase orders rather than station specific orders. By using Nuclear system-wide agreements, outage work at each station can be coordinated so that some of the same workforce can be moved from one station to the other, thereby achieving cost savings for PECO for both training and badging costs. Toward this end, both the health physics and radwaste service contracts for both stations were presented in one bid specification.
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> As a result of further review of the radwaste proposals for Limerick and Peachbottom, it came to our attention that having one Labor contract applicable

to both sites would enable the contractor to move his personnel between the two locations thus maximizing the cost saving benefits of a system-wide contract. Thus, it is our belief that this could best be accomplished using the General Presidents Maintenance Agreement ("GPMA").[1]

Please let us know if you can accomodate these concerns and how these accomodations would impact our proposed billing rates.

On December 27, 1993, Bartlett wrote a "Letter of Intent" to Thomas H. Owens, Administrator of the AFL-CIO's Building and Construction Trades Department, which stated in pertinent part that:

Please find enclosed a copy of a [December 22, 1993] letter from John C. Thomas of Philadelphia Electric Company requesting us to proceed with the General Presidents' Maintenance Agreement (GPMA). Mr. Thomas has requested that I send this directly to the General Presidents' Committee and has informed me that you should contact him directly if you need any additional information.

That same day, Bartlett notified Thomas that Bartlett Services had applied to the GPMA and would "appreciate any help the Philadelphia Electric Company may provide as owner to expedite this process." On December 29, 1993, PECO informed Bartlett Services that it was awarding the radwaste contract for both sites to Bartlett Services, reiterating that "[i]t is our desire that this work be performed under the General Presidents' Maintenance Agreement ("GPMA") which you have confirmed is possible."

Shortly thereafter, the Building and Construction Trades Department approved Bartlett Services' application and assigned work under the GPMA to Laborers Local 135 at Limerick and Laborers Local 1176 at Peachbottom.[2]

On January 10, 1994,[3] Bruce Bartlett and Jerry Hiatt, Vice-President-Technical Services of Bartlett Services, met with ARC's Limerick radwaste technicians by shift at a hotel near the plant. Bartlett introduced the employees to Bartlett Services and announced that the Company had hired former ARC supervisors Don Updegrove and Christopher Kelly as supervisors. Bartlett also announced that Laborers Local 135 would be representing the employees, under the terms of the GPMA, if they came to work for Bartlett. When asked why OCAW could not continue its representation, Bartlett responded that OCAW was not under the GPMA. He said that Local 135 representatives would be available to speak with employees the following day. Bartlett then described the wages and benefits to be provided under the GPMA,[4] and asked employees if they were willing to work for Bartlett Services. Each employee responded affirmatively. Bartlett then asked them to take employment applications and report to work the next day.

That evening, Updegrove and Kelly called employees Joan Bartholomew and Mark Tevis at home and told them they would not be hired by Bartlett Services and should file for unemployment. Bartholomew and Tevis had been active Union officers for years and had been shop stewards. Both employees had good performance records, and no attendance or other performance problems, with ARC.

On January 11, groups of employees met with Local 135 representatives at the Personnel Processing Facility at Limerick. The Laborers representatives distributed

union cards and dues check-off cards and answered questions about the GPMA. Bartlett Services' Jerry Hiatt attended the meeting for a short time, to answer questions. When the employees asked him whether they had to sign cards for the Laborers, he told them that they "had to be represented under the GPMA," and that if they didn't want the Laborers - he left the sentence unfinished and shrugged his shoulders. Nearly all of the employees signed cards for the Laborers at the end of the meeting.

On February 12, Bartlett Services entered into a supplementary collective-bargaining agreement with Laborers Local 135 which included wages and terms and conditions of a local nature not addressed in the GPMA.

In May, in response to a Section 8(a)(2) and (5) charge filed by the Union,[5] Bartlett Services terminated its collective-bargaining relationship with the Laborers and recognized the Union as the employees' bargaining representative. Bartlett Services and the Union promptly began negotiations for a new agreement, but Bartlett Services continued to apply the terms and conditions of the Laborers contract, except for the dues deduction provision, during negotiations.[6]

On June 10, Bartlett Services laid off four employees, including Ed Penrose, who had provided affidavits and assisted the Board in the investigation of the Section 8(a)(2) and (5) charge. Penrose had been a shop steward for the Union, and had informed PECO and Bartlett Services managers of his efforts to assist the Union in displacing the Laborers. Penrose was selected for layoff over a more junior employee with the same evaluation score.[7]

During the first week in December, Bartlett Services and the Union executed a collective-bargaining agreement. The Union has since informed the Region that it does not want to withdraw the charges.

PECO's involvement with Bartlett Services' employees' terms and conditions of employment since the award of the subcontract has been as follows. Pursuant to federal regulation, PECO performs background checks, physical and psychological evaluations, and employee training for Bartlett Services' employees. It determines what work will be done by Bartlett Services, what equipment will be used, and the frequency with which various tasks must be accomplished. It has authority to bar an employee from the facility on a permanent or temporary basis for various infractions of safety and other rules. PECO does not interview or otherwise participate in hiring decisions regarding Bartlett Services' applicants. It very rarely directly supervises Bartlett Services' employees. It does not discipline or discharge the employees or participate in grievance resolution. There is no evidence that it has ever participated, directly or indirectly, in collective-bargaining negotiations.

ACTION

We conclude that Bartlett Services and PECO are joint employers of Bartlett Services' employees and that PECO is jointly and severally liable for Bartlett Services' violations of Section 8(a)(1), (2), (3), (4), and (5) of the Act. In addition to the violations found by the Region, the joint employers violated the Act by unilaterally setting initial terms and conditions of employment in January 1993.[8] We further conclude that PECO did not commit an independent violation of Section 8(a)(2) and (1) of the Act by refusing to enter into an agreement with Bartlett

Services unless Bartlett Services withdrew recognition from the Section 9(a) representative and entered into an unlawful agreement with a non-majority union.[9]

1. Joint Employer

Joint employer status will be found where two separate entities "share or codetermine those matters governing essential terms and conditions of employment."[10] Whether an employer possesses sufficient indicia of control over employees who are employed by another employer (e.g., a subcontractor) is essentially a factual question. It must be shown that the employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."[11]

In making that determination, the Board has held that an employer's retention of the right to reject a subcontractor's employees from performing work under the subcontract does not establish joint employer status where the employer cannot discharge the subcontractor's employees.[12] The Board also has held that an employer's requirement that its subcontractor's employees undertake various activities in compliance with federal regulations, and the monitoring of those activities directly by the employer, does not establish joint employer status.[13] Moreover, the exercise of general control over a subcontractor's service, in the form of determining what work will be performed, how it will be accomplished, and the frequency of assigned tasks, is distinguishable from the kind of direct supervision of employees that provides evidence of an employment relationship between an employer and another employer's employees.[14]

On the other hand, the Board has held that, even in the absence of any other indicia of a joint employer relationship, a requirement by one employer that its subcontractor adopt a particular collective-bargaining agreement vis-a-vis its employees could establish that the employer codetermined the terms and conditions of employment of its subcontractor's employees and therefore was a joint employer of those employees. In Union Carbide Building Co., 276 NLRB 1410 (1985), the Board rejected an application for EAJA fees by a building management company which the Board had determined was not a joint employer with a cleaning subcontractor that had unlawfully terminated employees. The subcontractor had testified that it had entered into a particular collective-bargaining agreement with the union because the building management company had required this as a condition of awarding the subcontract. The Board had rejected this testimony on credibility grounds. In the subsequent EAJA litigation, however, the Board explained that, had this testimony been credited, it could have demonstrated in and of itself that terms and conditions of employment of the maintenance employees were effectively established by the management company and that the management company was therefore a joint employer of the employees.

In the Section 8(b)(4)(B) context, the Board has held that an employer that controls the identity of its subcontractor's employees is a joint employer (and therefore not a "neutral"), even if it has no other involvement with the employees' terms and conditions of employment.[15] Where one employer inserts itself in such a "basic area" of the other employer's labor relations, nothing further need be shown to demonstrate joint employer status.[16]

As a preliminary matter, we note that PECO does not have the kind of involvement with hiring, firing, discipline, supervision and direction that the Board has found sufficient to demonstrate joint employer status.

However, we conclude that PECO is a joint employer with Bartlett Services since, at the outset, PECO determined many of the Bartlett Services' employees' terms and conditions of employment, as well as the identity of the employees' bargaining representative, by requiring as a condition of award of the subcontract that Bartlett Services enter into the GPMA agreement. Thus, in PECO's December 22 statement expressing its "belief that [PECO's new system-wide approach to radwaste services] could best be accomplished using the General Presidents' Maintenance Agreement (GPMA)," PECO strongly implied that the winning bid would be made to a contractor signatory to the GPMA.[17] This implication was reinforced by PECO's later statements regarding its "desire that the work be performed under the GPMA." Bartlett Services' actions in response to PECO's statements, i.e., statements to the AFL-CIO that PECO had "requested it to proceed" in accordance with the GPMA, and statements to its employees that they "had to be covered by the GPMA," demonstrate that Bartlett Services believed it was required to enter into the GPMA as a condition of obtaining the subcontract.[18] Under Union Carbide, this is sufficient to demonstrate that PECO codetermined terms and conditions of employment for Bartlett Services' employees and thus is a joint employer with Bartlett Services.

2. Independent Violations by PECO

An employer violates Section 8(a)(3) and (1) by directing another employer with which it has business dealings to discharge or otherwise affect the working conditions of the latter's employees because of their union activities.[19] So long as the relationship between the two employers has "an intimate business character,"[20] the absence of a direct employer-employee relationship between the employer directing the employment action and the affected employees does not preclude the Board from finding a Section 8(a)(3) violation.[21]

On the other hand, an employer ordinarily can terminate its business relationship with another employer, even if it does so for discriminatory reasons, without violating Section 8(a)(1) and (3).[22] In Malbaff, the Board overruled its decision in Musser[23] and held that a union did not violate Section 8(b)(2) and 8(b)(1)(A) of the Act by picketing a construction project in order to force the general contractor to cease doing business with a nonunion subcontractor, with the resultant loss of employment by the subcontractor's employees because of their nonmembership in the union. The Board first found that an employer does not unlawfully discriminate against employees, within the meaning of Section 8(a)(3), by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees. This conclusion was based on the fact that Section 8(a)(3) protects employees, not employers, from discrimination. The Board then concluded that, "if an employer does not violate Section 8(a)(3) by terminating a business relationship with another employer, union pressure merely designed to achieve such an end would not violate Section 8(b)(2)."[24] The Board emphasized that Section 8(b)(4) protects employers from strikes and other coercive tactics designed to cause cessation of business between a neutral employer and primary employer.

The Board's decision and rationale in Malbaff, coupled with the Georgia Pacific and Dews line of cases,[25] represents a balance between an employer's right to decide with whom it does business and employees' Section 7 right to organize. In this regard, we note that under Board law prior to Malbaff, since an employer would violate the Act by ceasing to do business with another employer because of the latter's employees' union or nonunion activity, a union would also violate the Act by merely seeking to noncoercively influence an employer to cease doing business with another employer because the employees of that other employer were nonunion.[26]

The instant case is governed by Malbaff, and not by Georgia Pacific and Dews. PECO did not direct Bartlett Services to commit violations of the Act. Rather, PECO simply stated that it would not do business with Bartlett Services unless Bartlett Services took certain actions vis-a-vis its employees that were unlawful.[27] In this regard, the refusal to enter into a business arrangement is analytically the same as the cessation of a business relationship described in Malbaff. Concededly, an employer cannot terminate its business relationship with an employer with whom it has a joint employer relationship because of the employees' union activities.[28] However, since PECO did not become the joint employer of Bartlett Services' employees until it succeeded in establishing their terms and conditions of employment through the GPMA, PECO's statements that it would not enter into a business relationship with Bartlett Services except under the GPMA were made before it became a joint employer of the Bartlett Services employees.

Accordingly, the Region should issue a Section 8(a)(1), (2), (3), (4) and (5) complaint, absent settlement, against Bartlett Services and PECO as joint employers,[29] and should dismiss, absent withdrawal, the allegations that PECO independently violated the Act.

R.E.A.

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[1] The GPMA is a multiemployer Section 8(f) national prehire agreement for construction work of the type performed by radwaste technicians during periodic power outages.

[2] The IBEW filed unfair labor practice charges, which were handled by Region 5, concerning the Peachbottom actions. The charges were settled informally when Bartlett withdrew recognition from the Laborers and recognized IBEW as the Section 9 (a) representative.

[3] All dates hereafter are in 1994 unless otherwise noted.

[4] Bartlett Services has told the Region that wages were not actually set in the GPMA, but were subject to local negotiations, which took place the following month. At this initial meeting, Bartlett's statements regarding wages were actually based on what the Company was paying at the Peachbottom facility. Bartlett also described other terms and conditions of employment, including holidays and other benefits, that were established by the GPMA.

[5] The initial charge, filed in February, did not name PECO as a joint employer with Bartlett. The charge was amended in March to allege that Bartlett and PECO, as joint employers, violated Section 8(a)(1),(2),(3) and (5) of the Act by withdrawing recognition from the Section 9(a) representative, recognizing a non-majority union when there was an existing 9(a) representative, unilaterally changing terms and conditions of employment, and refusing to hire employees because of their Section 7 activities.

[6] For example, employees report that they were not paid for Memorial Day, which was a paid holiday under the Union's agreement with ARC but not under the Laborers' contract. Also, they continued to receive wages and the bonus rate provided for in the Laborers' contract.

[7] The Union filed another charge in June alleging that Bartlett Services and PECO violated Section 8(a)(1),(3),(4), and (5) by unlawfully laying off employees and by failing to bargain in good faith.

[8] See Appeals Minute in Oakwood Care Center, 1-CA-31870, [*FOIA Exemption 5*

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[9] The Region determined that PECO could not have independently violated Section 8(a)(5) by encouraging Bartlett to withdraw recognition from the Union since PECO did not have a collective-bargaining relationship with the Union. PECO did not independently violate Section 8(a)(3) and (4) because the Region has determined that PECO was not involved in either the decision not to hire Bartholomew and Tevis or the decision to lay off Penrose.

[10] Laerco Transportation and Warehouse, 269 NLRB 324, 325 (1984)(citing Boire v. Greyhound Corp., 376 U.S. 473 (1964) and NLRB v. Browning-Ferris Industries, 691 F.2d 1117 (3d Cir. 1982).

[11] Laerco, 269 NLRB at 325. Accord: Chesapeake Foods, Inc., 287 NLRB No. 43, slip op. at 7 (1987).

[12] See Laerco, 269 NLRB at 324.

[13] See Osco Drugs, 294 NLRB 779, 783, 786-787 (1989).

[14] See Southern California Gas Co., 302 NLRB 456 (1991).

[15] See Local 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Roslyn Americana Corp.), 214 NLRB 868 (1974) (general contractor was joint employer with its subcontractor where their contract required the subcontractor to employ only those persons "agreeable to" the general contractor); Bricklayers Union Local 29 (J.E. Hoetger and Company), 221 NLRB 1337, 1339 (1976) (general contractor was joint employer with its subcontractor where their contract provided that the subcontractor could only employ members of

particular unions).

[16] 221 NLRB at 1339.

[17] See Union Carbide, 276 NLRB at 1411 (subcontractor president's belief that building management company had required him to enter BOMA agreement was based on fact that "[w]hen I bid the job he said keep it in mind that this is a BOMA building.")

[18] Bartlett Services' recent statements, in position statements to the Board, to the effect that it decided on its own to execute the GPMA and did not feel constrained to do so by PECO, are self-serving and inconsistent with its contemporaneous statements and actions.

[19] See, e.g., Dews Construction Corp., 231 NLRB 182, n.4 (1977), enfd. mem. 99 LRRM 2633 (3d Cir. 1977) (general contractor violated Section 8(a)(3) by causing its subcontractor painting company to discharge an employee for engaging in union activities); Black Magic Resources, Inc., 312 NLRB 667 (1993); Georgia-Pacific Corp., 221 NLRB 982, 986 (1975) (company unlawfully instructed independent construction contractor to discharge and refuse to hire strikers from another plant of its parent corporation). See also Fabric Services, 190 NLRB 540, 542 (1971) (employer violated Section 8(a)(1) by refusing to allow an employee of a telephone company to work in the employer's plant while wearing union insignia).

[20] See Holly Manor Nursing Home, 235 NLRB 426, 428, n. 4 (1978).

[21] See International Shipping Association, 297 NLRB 1059 (1990))(an employer under Section 2(3) of the Act may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship); Central Transport, Inc., 244 NLRB 656, 658-659 (1979).

[22] Local 447, Plumbers (Malbaff Landscape Construction), 172 NLRB 128 (1968); Local Union 180 (Carpenters), 181 NLRB 94 (1970); Edward Carey, et al., Trustees of UMW, 201 NLRB 368 (1973). Cf. Whitewood Maintenance Co., 292 NLRB 1159, 1164 (1989) (joint employers violated Section 8(a)(3)). There is nothing in the language or jurisprudence of Section 8(a)(2) that would indicate a different analysis would apply where an employer's cancellation of a business relationship had effects unlawful under Section 8(a)(2) rather than Section 8(a)(3).

[23] St. Maurice, Helmkamp & Musser, 119 NLRB 1026, 1029-1032 (1952).

[24] 172 NLRB at 129.

[25] See cases cited in fns. 19-21 supra.

[26] See, e.g., Carpenters Local 998, 125 NLRB 854, 859 (1959); Local 911, Teamsters (Wand Corp.), 122 NLRB 499 (1958).

[27] We reject PECO's alternative argument that it did not condition the award on

"unlawful" actions by Bartlett Services since it did not require, as a condition of award, that Bartlett Services hire the ARC employees and then reject their bargaining representative. PECO's conditioning of the award on Bartlett's adoption of the GPMA required that Bartlett either take the actions it took or take other unlawful actions such as refusing to consider the ARC employees for employment in order to avoid successorship liability. See Love's Barbeque Restaurant No. 62, 245 NLRB 78 (1979), enfd. in relevant part, 640 F.2d 1094 (9th Cir. 1981).

[28] See Whitewood Maintenance Co., 292 NLRB 1159, 1164-65 (1989).

[29] The remedy to be sought against PECO would include a cease and desist order; notice posting; joint and several liability for backpay with regard to unlawful unilateral changes in terms and conditions of employment (e.g., nonpayment for the Memorial Day holiday) and the unlawful refusals to hire and layoff; and a bargaining order.